

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

REGINA P. DICKERSON,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSF 1 692 609)

DOCKET NUMBER
AT08318910382

DATE: FEB 14 1991

P. L. Clanton, Jr., Hahira, Georgia, for the appellant.

Reginald P. Jones, Jr., Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The agency has filed a petition for review of an initial decision issued on June 13, 1989, reversing its reconsideration decision and granting the appellant a survivor annuity. For the reasons below, the petition is GRANTED and the initial decision is REVERSED. See 5 C.F.R. § 1201.115.

BACKGROUND

The facts in this case are not in dispute. William M. Dickerson (Dickerson), an Aircraft Jet Engine Mechanic, retired on disability on May 7, 1963, with over 15 years of federal service. After 22 years of marriage, he and the

appellant were divorced in 1964. On April 5, 1967, the Office of Personnel Management (OPM) notified Dickerson that it had determined that he had recovered from his disability and that his annuity would terminate on March 3, 1968. The notice also informed him that if he was not reemployed under the Civil Service Retirement System (CSRS), he would be entitled to a deferred nondisability annuity at age 62, effective December 8, 1982. See Appeal File, Tab 6, Subtab 2d. Dickerson was never rehired as a federal employee and died on May 16, 1983.

In March 1987, the appellant applied for survivor annuity benefits as a former spouse. OPM denied such benefits and affirmed its denial in its reconsideration decision issued on January 31, 1989. OPM denied the benefits because Dickerson was neither an employee nor a retiree at the time of his death. Although he was eligible upon application for a deferred annuity commencing on December 8, 1982, he never filed a claim for such benefits. OPM cited to 5 U.S.C. § 8331(9) defining the term "annuitant" as an employee who "meets all requirements ... for title to annuity and files claim therefor" and to its own regulations at 5 C.F.R. § 831.603 defining the term "retiree" as an employee who "is receiving payments under the CSRS based on service by the employee."

On appeal, the administrative judge concluded that there was nothing in the language of the applicable statute, the Spouse Equity Act, codified in relevant part at 5 U.S.C. § 8341 note, which requires that a former employee must have

applied for and been receiving benefits in order for his former spouse to qualify for a survivor annuity. He further found that pursuant to *Horner v. Benedetto*, 847 F.2d 814 (Fed. Cir. 1988), Dickerson was effectively "retired" when he became entitled to receive his deferred annuity on December 8, 1982. Because he then found that Dickerson had retired prior to May 7, 1985, the administrative judge found that the appellant was entitled to a survivor annuity inasmuch as she met the other requisite statutory and regulatory criteria set forth at section 8341 note and 5 C.F.R. § 831.622(a)(2).

In the petition for review, OPM again contends that Dickerson had to have filed an application for retirement annuity prior to his death in order to enforce his inchoate right to a deferred retirement annuity and that Dickerson had to have "retired" before his former spouse could be entitled to a survivor annuity. In support of its contention, OPM cites to section 4(b)(1) of the Spouse Equity Act and to 5 U.S.C. § 8341(b)(1) and contends that these provisions require that the retiree, in his own right, must have perfected title to an annuity before a former spouse can be entitled to a survivor annuity. In addition, it cites 5 U.S.C. § 8345(i)(1), requiring that no payment be made from the retirement fund unless an application for benefits, based on the service of the employee, is received by OPM before the 115th anniversary of the employee's birth, and again to 5 U.S.C. § 8331(9), and states that the Board has held in *Oshiver v. Office of Personnel Management*, 38 M.S.P.R. 191

(1988), that these two provisions require that an annuity only becomes payable after the annuitant files an application. Finally, OPM contends that its regulations at 5 C.F.R. § 831.603 (defining the term "retiree") and § 831.622(a)(2) (implementing the Spouse Equity Act) are valid and that the Board should defer to OPM's interpretation of the relevant statute.

ANALYSIS

The burden of proving entitlement to a survivor annuity is on the applicant for benefits. See *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1986), cert. denied, 479 U.S. 1037 (1987). Based upon our review of the relevant statutory provisions and case law, we find that the appellant has not shown that she is entitled to a survivor annuity.

The Spouse Equity Act, Pub. L. No. 98-615, § 4(b)(1), as amended, provides that "a former spouse of an employee or member who retired before May 7, 1985, or who died after becoming eligible to retire and before such date ..." is entitled to a survivor annuity. See 5 U.S.C. § 8341 note. Thus, in order to perfect a claim to an annuity, the former spouse must have been the spouse of an "employee" who "retired" before May 7, 1985, or an "employee" who died before May 7, 1985, after becoming "eligible to retire." The appellant does not meet these basic eligibility requirements.

We find that at the time he died Dickerson was neither an employee nor a retiree within the meaning of Section 4(b)(1).

The Board held in *Henderson v. Office of Personnel Management*, 42 M.S.P.R. 207 (1989), that a surviving spouse was not entitled to survivor annuity benefits under section 8341(d) because she had not shown that her husband was a federal employee or annuitant when he died. As the Board noted therein, section 8331(1)(A) of title 5, United States Code, defines the term "employee" as meaning "an employee as defined in section 2105 of this title." Section 2105(a)(1) defines an "employee" as one who "is appointed to the civil service." The language of section 2105 does not encompass the term former employee, but only one who is currently employed.* The term employee, therefore, as used in section 4(b)(1) must be given a similar meaning. Although Dickerson was "eligible to retire" on a deferred annuity at the time of his death in May 1983, he was not an "employee" eligible to retire as required by section 4(b)(1). Cf. *Hollander v. Office of Personnel Management*, 39 M.S.P.R. 195 (1988), review granted sub nom. *Horner v. Hollander*, 878 F.2d 1443 (Fed. Cir. 1989) (Table), where the Board held that the former spouse of an employee, a person currently appointed to an agency, who may have been eligible for disability retirement but who died before filing an application, could be eligible for survivor

* To be considered a federal employee for retirement credit purposes, an individual must be appointed in the civil service by a federal official acting in his official capacity; must be engaged in the performance of a federal function under authority of law or executive act; and must be under the supervision of a named federal official while engaged in the performance of the duties of his position. See *Horner v. Acosta*, 803 F.2d 687, 691 (Fed. Cir. 1986).

annuity benefits as the former spouse of an "employee" who is "eligible to retire."

Further, the administrative judge erred in relying on *Benedetto* to find that Dickerson "retired" before May 7, 1985. In *Benedetto*, the Federal Circuit held that a former federal employee's rights to a reduced annuity with survivor benefits was governed by the law in effect when he was entitled to receive deferred annuity benefits, rather than that in effect when he separated from federal service. That case did not involve an annuity for a former spouse. Nor did it involve an inchoate right to an annuity because *Benedetto* had submitted an application for his deferred annuity and therefore was entitled to retire. Thus, *Benedetto* does not support the proposition that Dickerson retired before May 7, 1985.

OPM also argues that *Oshiver* precludes the appellant from obtaining a survivor annuity because Dickerson never submitted an application for an annuity. The Board held in *Oshiver* that sections 8331(9) and 8345(i)(1) require that an annuity only becomes payable after the annuitant (or someone acting on his behalf in the case of a disability retirement) files an application. *Oshiver* at 195. *Oshiver* is distinguishable from the instant case because it involved an application for retirement benefits on behalf of a missing person. Nonetheless, OPM's interpretation of the relevant statutory provisions and its implementing regulations is entitled to deference and the Board will reject the agency's interpretation only if there are compelling indications that

it is wrong. See *Oshiver*, *id.*; *Adakai v. Department of the Interior*, 20 M.S.P.R. 196, 201 (1984). Here, OPM notes section 8331(9) defining the term "annuitant" as an employee who "meets all requirements ... for title to annuity and files claim therefore." and cites to its own regulations at 5 C.F.R. § 831.603 defining the term "retiree" as an employee who "is receiving payments under the CSRS based on service by the employee." Under this definition, Dickerson was neither an annuitant nor a retiree because he had not filed for deferred annuity benefits and was not receiving payments under the CSRS.

Thus, because Dickerson was neither an employee nor a retiree under section 4(b)(1), the appellant is not eligible for former spouse survivor annuity benefits.

ORDER

This is the final Order of the Merit Systems Protection Board in this appeal. See 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

for Matthew Shumaker
Robert Taylor
Clerk of the Board